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SUPREME COURT OF THE STATE OF NEW MEXICO
PETITION FOR A WRIT OF CERTIORARI TO THE

THE FEDERAL LAND BANK OF WICHITA, Respondent

v.

E. B. BURCETT AND WINNIE BURCETT, Petitioners

No. 77- 1 9 E - 7 7

OCTOBER TERM, 1977

Supreme Court of the United States

IN THE

MICHAEL RODAK, JR., CLERK
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

E. B. Burgett and Winnie Burgett, Petitioners

v.

The Federal Land Bank of Wichita, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico entered in the above case on June 13, 1977.

OPINIONS BELOW

The Final Decree of the District Court of Otero County, New Mexico, Twelfth Judicial District, granting Default Judgment in favor of Respondents and against Petitioners, foreclosing petitioners' mortgage, ordering judicial sale of petitioners' property, and ordering execution on any deficiency after sale against petitioners, is unreported. The Order of the District

Court of Otero County, New Mexico, supported by Findings of Fact and Conclusions of Law, denying petitioners' motion to set aside the default judgment and vacate the sale of the foreclosed property is also unreported. Copies of the Decree, Order, and Findings of Fact and Conclusions of Law are appended to this petition in Appendices A, B and C at pages 1a, 7a, and 11a, respectively. The decision of the Supreme Court of the State of New Mexico affirming on appeal the Order of the District Court was filed without an opinion and is reported at 90 N.M. ———————. The Order of the Supreme Court of New Mexico denying petitioners' motion for rehearing is reported at 90 N.M. ———————.[1]

JURISDICTION

The Decision of the Supreme Court of the State of New Mexico was made and entered on June 13, 1977. Petitioners' motion for rehearing was denied by Order of the Supreme Court on June 30, 1977. Copies of the decision and the order are appended to this petition in the Appendices D and E pages 12a and 13a, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Respondent, The Federal Land Bank of Wichita (hereinafter, Bank) filed suit on November 18, 1975, seeking judgment on a promissory note and foreclosure of the mortgage securing this note. Judgment on the

[1] Local counsel informs us that New Mexico does not publish advance sheets of their Supreme Court. These decisions will be reported in the yearly volume of New Mexico decisions published after the end of this year.

note was sought against E. B. Burgett, his wife, Winnie Burgett, his son Everett Dale Burgett, and two closely held New Mexico corporations controlled by them as makers of the note. The mortgage sought to be foreclosed was given as security for the note by E. B. Burgett and his wife as sole record owners of the subject property, in favor of the respondent bank.

On November 19, 1975 substituted service was made on E. B. Burgett and his wife by affixing copies of the Summons and Complaint to the door of their alleged "usual place of abode" pursuant to statutory authority in N.M.S.A. 1953, Section 21-1-1(4)(e)(1) which provides in pertinent part:

> "If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served, to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy then service shall be made by posting such copies in the most public part of the defendant's premises."

A Default Judgment was entered on August 5, 1976, against E. B. and Winnie Burgett (hereinafter the Burgetts) for their failure to appear and answer the Bank's complaint.

The Burgetts filed a motion to set aside the Default Judgment on the grounds that service of process was insufficient, the court lacked personal jurisdiction, and neither notice nor opportunity to be heard had been given.

The District Court of Otero County denied the Burgetts' motion and the Supreme Court of New Mexico affirmed this decision. The questions presented are:

1. Whether N.M.S.A. 1953, Section 21-1-1(4)(e)(1), which permits service solely by "posting" a copy of the Summons and Complaint on the most public part of the defendants' "premises" is reasonably calculated to give adequate notice as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the construction placed on the phrases "premises" and "usual place of abode" by the New Mexico courts, which permits a defendant to be served at a residence where he is not presently residing but to which he intends to return at some indefinite time in the future, is reasonably calculated to give adequate notice of the commencement of judicial proceedings as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the Due Process clause of the Fourteenth Amendment to the United States Constitution:

> Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statute involved is New Mexico Statutes Annotated 1953 Comp. Section 21-1-1(e)(1):

(e) Summons—How Served

(1) [Making of Service] In civil causes summons and a copy of complaint may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action, over the age of eighteen (18) years. When served by the sheriff, proof thereof shall be by certificate and when served by a person other than the sheriff, proof thereof shall be made by affidavit. Such service may be made by delivering a copy of the process or papers to be served to the defendant; or if the defendant refuses to receive such copy, by reading same to said defendant; and if the defendant so refuses to receive such copies or hear the same read, such action shall constitute good service in law. If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy, then service shall be made by posting such copies in the most public part of defendants' premises.

STATEMENT

On November 18, 1975, the Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett R. Owens attempted to serve process on the Burgetts at a house owned by them in the town of Maybill, Otero County, New Mexico, located in the mountains at a high elevation. The Burgetts had resided in this house until October of 1975 when due to medical reasons they had moved to a furnished trailer at 2700 West Washington in Artesia, New Mexico. E. B. Burgett is 80 years old and has developed respiratory problems over the past several years. During 1975, his doctors advised him to undergo surgery and to move to a lower elevation to ameliorate these problems. It

was in response to his physician's advice that Mr. Burgett and his wife moved to Artesia. The Burgetts have lived in Artesia since October, 1975 until at least September 19, 1976. Although no longer in Artesia, the Burgetts have never returned to the house in Maybill and continue to live at lower elevations.

When Mr. Owens attempted to serve process, he found no one at the house in Maybill. After personally serving Everett Dale Burgett, who lived in a house across the highway from the Burgetts' house, Mr. Owens asked him where the Burgetts could be found. Dale told Mr. Owens that his parents no longer lived at the house in Maybill but refused to disclose their present address in Artesia. He told Mr. Owens that his refusal was made to spare his father, who was seriously ill at the time, from what be regarded as undue distress and concern.

Mr. Owens then went to Cloudcroft, a nearby town, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house owned by the Burgetts in Maybill. Officer Briscoe told Mr. Owens that be believed the Burgetts still resided at the house in Maybill because be had seen E. B. Burgett recently at the post office in Cloudcroft. After returning to the house in Maybill, knocking on the door and finding no one present, Mr. Owens attached two copies of the Summons and Complaint to the backdoor of the Burgetts' house in Maybill. No other method or manner of service on the Burgetts was made or attempted. The commencement and pendency of this action were never communicated to the Burgetts either by Everett Dale Burgett or by any other person.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett.

The judgment held the Burgetts and Everett Dale Burgett jointly liable on the promissory note, foreclosed the mortgage given by the Burgetts on property they owned as sole record owners securing the note, ordered judicial sale of the property, and execution of any deficiency after the sale.

On August 26, 1976, the Burgetts received by certified mail, return receipt requested, a copy of the judgment in this case. This copy was properly mailed by the Bank's attorneys to the Burgetts' current residence at 2700 Washington, Artesia, New Mexico, and not to their former residence, where service originally was attempted, in Maybill, New Mexico. Immediately upon receiving this judgment, the Burgetts' first knowledge of the action, they contacted counsel and on September 10, 1976, filed a Motion to Set Aside the Judgment. This motion was predicated on the ground that "no proper service of process was ever had on the Burgetts" since the posting of process was not done at the Burgetts' current residence and usual place of abode which was 2700 Washington, Artesia, New Mexico.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law and denied the Burgetts' motion to set aside the

judgment, holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: A finding that the Burgetts "were temporarily in Artesia, New Mexico, when service of process in this case was served"; a finding that Emmett Owens served the Burgetts "by firmly attaching" copies of the summons and complaint to "the most commonly used door" of their house in Mayhill, New Mexico; a finding that "no other attempt of service was ever made"; a finding that the Burgetts' "domicile, residence, usual place of abode and premises" was their house located in Mayhill, New Mexico, and not in Artesia, New Mexico; and a conclusion of law that the Burgetts "were properly served" and "had notice of this action."

It must be assumed that the conclusion of law that the Burgett's "had notice" of this action refers to constructive and not actual notice, since there is no evidence in the transcript of the hearing on the motion to support a finding that the Burgetts had actual notice and no such finding or conclusion was made by the District Court.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's conclusions of law including the conclusion that service of process was properly made on them. Although specific mention of denial of due process as the basis of the appeal was not made by the Burgetts' attorneys below, who relied primarily on the ground of insubstantial evidence to support a finding of proper service, there can be no doubt that the constitutional question was before the Supreme Court of the State

of New Mexico. The Burgetts' brief to the Supreme Court of New Mexico stated on page 6:

> "In this case before the Court, the Appellants have lost their property by Default Judgment without opportunity to plead their potential defenses."

In the Bank's Answer Brief, the question of denial of due process is discussed at some length on pages 5 and 6. The Decision of the Supreme Court of New Mexico affirming the District Court without opinion, held that substantial evidence supported the findings that notice was properly given by posting process at the Burgetts' usual place of abode. The Burgetts' motion for rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

REASONS FOR GRANTING THE WRIT

This case presents in stark relief the injustice which results when a court mistakenly exercises jurisdiction over persons who have no knowledge of the pendency of a law suit. The Burgetts are being subjected to personal liability and loss of their property without any opportunity to present defenses they might have. The procedure adopted by the State of New Mexico to give notice of court actions is, as this case demonstrates, often inadequate to accomplish that task and is nothing more than a pro forma exercise. Neither the federal rules [2] nor most states permit such a defi-

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[2] Federal Rules of Civil Procedure 4(d)(1) requires service upon individuals to be made either personally or by leaving copies of process with "some person of suitable age and discretion" who resides with the defendant at his "dwelling house or usual place

cient procedure to be employed.[3]

The importance of the question presented by this case is apparent. Every defendant's notice of his duty to appear and present his case comes from service of process. Therefore adequate service must satisfy the requirements of due process of law. Due process requires a statutory method of service reasonably calculated to put the defendant on notice of the action. As this Court recognized in *Wuchter* v. *Pizzuti,* 276 U.S. 13 (1928), the questions of the constitutional validity of the statute and of its construction remain regardless of whether actual notice was received by the defendant.

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute, it cannot, therefore, supply constitutional validity to the statute or service under it." *Wuchter* v. *Pizzuti,* 276 U.S. 13 at 25.

It is true that actual notice to every defendant in every action has been held by this Court not to be a mandatory requirement. *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950). However, this court also stated in *Mullane, supra.* at 314:

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of abode." 4(d)(7) authorizes service on an individual "in the manner prescribed by the law of the state in which the district court is held."

[3] New York—Civil Practice Law and Rules § 308 (McKinney, 1972) Michigan—General Court Rules 1963, 105.1-.8 (Michigan Statutes Annotated, 1976) Minnesota—Rules of Civil Procedure 4.03(*a*) Minnesota Statutes Annotated Vol. 27A Court Rules. Of these three representative states only one (New York) explicitly permits posting at the "usual place of abode" and then *only* in conjunction with mailing to defendants last known address. Michigan may permit posting but only after a hearing and pursuant to court order. See General Court Rules 1963, 105.8 (Michigan Statutes Annotated, 1976)

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Wuchter requires that any statute governing service must be adequate on its face to provide notice to defendants. If this requirement is satisfied, *Mullane* requires that the statute, after consideration of all the circumstances of the case, be reasonably calculated to give notice.

I. New Mexico's Procedure Governing Service of Process Does Not Satisfy Due Process in a Modern Society

New Mexico's statute governing service has been unchanged in its present form for over fifty years. What may have been adequate during the early twentieth century is not adequate today. Posting a summons at the usual place of abode or permises of a dedefendant without more and with only thirty days to respond before default is entered, is not reasonably calculated to provide notice given the realities of modern society. This inadequacy is particularly acute when a defendant's "usual place of abode" or "premises" is construed as being a residence where the defendant is not then residing and will not be returning for an extended period of time, if at all.

We live in a mobile society. In the last five-year period from March 1970 to March 1975, the total number of persons moving to a new residence was 79,838,-000. In the one-year period from March 1975 to March 1976, the figure was 35,645,000. This is 20,000,000 more in the last year than the yearly average for the pre-

ceding five-year period. Bureau of Census, Current Population Report Services p. 20 #305. The divorce rate per one thousand of population increased from 4.8 to 5.0 from 1975 to 1976 and has doubled during the past decade. Id. p. 20 #307. The number of unmarried and unrelated persons living together has increased from 1,619,000 in 1975 to 1,829,000 in 1976, an increase of over 200,000 in one year. Id. p. 20 #287.

Given such mobility, the likelihood of New Mexico defendants not receiving actual notice and an opportunity to challenge a law suit before a default judgment is entered is substantial under the New Mexico statutory procedure employed against the Burgetts in this case. The New Mexico statute permits the process server to post the summons and complaint at a conspicuous place at the defendant's "premises" should he find no one present at those premises. Nothing more is required by the statute to authorize such postinn other than merely arriving at the defendant's home when no one is there. The process server need not ascertain if the defendant still lives there, nor if he is on an extended absence, nor even if anyone still lives there. He simply posts process and completes an affidavit. In New Mexico he need not do anything more nor is he required to obtain prior Court approval of this procedure as is required in other states.[4]

Once service is made under the New Mexico procedure permitting posting alone, if notice is not received by the defendant, as it was not received by the Burgetts in this case, first knowledge of the action

[4] New York requires "nailing" and "mailing", Michigan requires a court order to authorize any procedure other than personal service. See footnote 2 *supra*.

occurs when the default judgment is received or execution on the judgment is attempted. The defendant's opportunity to challenge the plaintiff's allegations and present his defense depends upon the construction placed upon the phrase "usual place of abode." If, as in the Burgett's case, the New Mexico court finds, in conformity with New Mexico law and interpretation, that the defendant had an intention to return to the residence, even though he received no actual notice, was not present at the time and, in fact, was living somewhere else "temporarily", then posting of service occurred at the "usual place of abode." Such a finding satisfies the statutory requirement and, ostensibly, due process. The defendant then is denied any opportunity to challenge the judgment on the merits. Certainly, such a statutory procedure is not "reasonably calculated, under all the circumstances, to apprise interested parties of the action" prior to judgment being entered.

II The Rule of Construction Applied to the Service Statute is Inadequate and Leads ot Anomalous Results Inconsistent with Due Process.

The number of cases in both state and federal courts interpreting service made at the defendant's "usual place of abode" is great. These cases have dealt with such questions as service at a hotel when the defendant was a guest [5] and when the defendant was a resident; [6]

[5] *Leigh* v. *Lynton*, 9 FRD 28 (D.C. N.Y. 1949) Defendant a guest at the hotel where service was made. Held, this was not his "usual place of abode" and service was quashed.

[6] *First National Bank and Trust Co. of Tulsa* v. *Ingerton* 207 F 2d 973 (10th Cir., 1953) Service made at defendant's son's home in Colorado where defendant was visiting. Held, defendant's "usual

at the defendant's place of business when his residence was in the same building;[7] at the defendant's apartment building by leaving copies with the defendant's landlord,[8] or with a relative of the defendant who lived in a neighboring apartment in the same building;[9] at a prisoner's residence while he was in the penitentiary,[10] and other usual and unusual situations. These cases are confusing, involving detailed factual discussions leading to differing and often irreconcilable decisions. *First National Bank and Trust Co.* v. *Ingerton* 207 F 2d 793 (10th Cir., 1953). It has been suggested by the Fourth Circuit Court of Appeals in *Karlsson* v. *Rabinowitz* 318 F 2d 666 (CA 4th 1963) that the key factor in deciding such cases is the fact of actual notice and whether the defendant knew of the suit and challenged process before or after judgment. In a case where actual notice has been received, the Fourth Circuit held that the Federal Rule governing service

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place of abode" was a hotel in Raton, New Mexico, and service was quashed.

[7] *United States* v. *N. Tully Semel, Inc.* 88 F. Supp. 732 (D.C. Conn., 1949) Defendant's business and residence in the same building and service made on an employee. Held, service was not made at defendant's "usual place of abode" and service was quashed.

[8] *Pickford* v. *Kravetz* 17 F.R. Serv. 4d. 121, Case I (D.C.N.Y., 1952) Service at transient hotel where defendant had been living for only three days. Held, service valid.

[9] *DiLeo* v. *Shin Shu,* 30 F.R.D. 56 (D.C.N.Y. 1961) Service left with defendant's daughter who lived next door in the same building. Held, service was not made at defendant's "usual place of abode" and service was quashed.

[10] *Bohland* v. *Smith,* 7 F.R.D. 364 (D.C.Ill., 1947) Service made at defendant's residence where defendant's wife still resided although defendant was a prisoner in the penitentiary. Held, service valid at defendant's "usual place of abode."

FRCP 4(d)(1) "should be liberally construed to effectuate service and uphold the jurisdiction of the court, thus insuring the opportunity of trial on the merits." 318 F 2d 668. Although the District Court made a conclusion that the Burgetts "had notice", there is no finding or conclusion that they had *actual* notice, rather than constructive notice. Regardless of the resolution of this factual question, the constitutional question remains.

The Fourth Circuit in *Karlsson* and other courts facing this question have disregarded the constitutional implications of relating a legal conclusion of sufficiency of process to a factual finding of actual notice. Constitutional sufficiency of a statute and the construction placed upon the phrase "usual place of abode" should not be made to depend upon the fortuitous factual circumstance of actual notice being received in a particular case. To do so leads to anomolous results. Assume service is made upon a man by posting process on the door of a motel room which he has taken for an afternoon with his paramour and he receives actual notice. Following the *Karlsson* reasoning the phrase "usual place of abode" should be liberally construed to effectuate service leading to a conclusion of sufficient service of process. The result is a decision which holds that the phrase "usual place of abode" may be construed as a motel room taken for an afternoon and be constitutionally valid. This is clearly wrong. It is no less wrong to permit, in the Burgetts case, a construction of "usual place of abode" which includes a house owned by the defendants but where no one resided at the time of service and to which the defendant's never returned. The *Karlsson* rule should be reexamined by this court because it ren-

ders the restriction that service must be made at the "usual place of abode" protean and nearly meaningless.

III. The New Mexico Service Statute is Unmatched in its Laxity and Violates Due Process of Law

Most of the statutes being interpreted in these cases, including *Karlsson,* permit service on another person of suitable age and discretion residing with the defendant at his usual place of abode.[11] This is in sharp contrast with the New Mexico statute which allows posting of process on the door of the "usual place of abode" if no one is present when the process server arrives. We know of no other jurisdiction which permits posting of a summons at an unoccupied residence alone to suffice for meeting the Constitutional requirement that service be reasonably calculated to give defendants actual notice of judicial proceedings.

The modern trend has been to extend the bases for acquiring personal jurisdiction and to relax the requirements of giving actual notice. New York is a good example. Prior to 1970, New York required personal service exclusively and only permitted substituted service of any kind pursuant to a court order after a hearing during which evidence of unsuccessful, good faith efforts to serve the defendant had to be submitted. In 1970 New York relaxed its requirements regarding service by amending CPLR § 308, (McKinney, 1972) in response to the growing problem of "sewer service."[12] The reasoning of the New York

[11] See Federal Rules of Civil Procedure 4(d)(1).

[12] For a description of the problem see 51 North Carolina Law Review, 1517 *Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions* (1972)

legislature was that less onerous requirements of service would more likely be complied with and thereby give actual notice than the difficult requirement of personal service which was, in many instances, being completely disregarded.[13]

However, New York has not gone as far as New Mexico. Although New York now permits posting at the defendant's place of business or usual place of abode, this may be done only in conjunction with mailing to the defendant's last known address.[14] At least under this procedure, the post office may have a forwarding address should the defendant not return to the place where process was posted. New York's procedure may be constitutionally adequate and effective in solving the problems of "sewer service." However, New York or other jurisdictions might desire to go even further and adopt New Mexico's even more relaxed requirement of merely posting at the defendant's "usual place of abode." This New Mexico procedure has never been subjected to constitutional challenge. New Mexico's unique, minimal, and relaxed method for service of process is at the unmarked frontier of constitutional adequacy. In light of the trend to relax notice requirements, this Court should again consider how far that boundary extends.

Granting the petition for certiorari in this case will enable this Court to consider in light of fundamental changes in our society, the procedures adopted or which may be adopted by the states which must be designed to reasonably, and in the best available manner, effect the first fundamental requirement of due

[13] CPLR § 308 Practice Commentaries (McKinney, 1972)

[14] CPLR § 308(4) (McKinney, 1972)

process of law—notice of judicial proceedings. New Mexico's procedure as applied in this case raises serious questions of deprivation of property without due process of law. A decision from this Court resolving the questions in this case will do much to end the confusion presented by these constantly recurring questions of sufficiency of process and notice.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation
Plaintiff,

VS.

E. B. BURGETT, et al., and WINNIE BURGETT, his wife; EVERETT DALE BURGETT; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico Corporation; MICHELLE IMPORTING COMPANY; DENVER WHOLESALE FLORISTS CO.; VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY; STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION; UNITED STATES OF AMERICA, *Defendants*.

Final Decree

(Filed 8/5/76)

THIS CASUE having come on to be heard by the Court on the Motions of the Plaintiff for Judgment in accord with the prayer of the Complaint; the Plaintiff appearing by its attorney, Norman D. Bloom, Jr., of the law firm of FETTINGER AND BLOOM; the Defendant Everett Dale Burgett having appeared pro se; and the Defendants, E. B. Burgett, Winnie Burgett, Burgett Wholesale Floral Company, and Burgett Floral Company, having appeared not; and the Court having examined and considered the records and files herein and being sufficiently advised in the premises, FINDS:

1. That the Complaint of the Plaintiff was duly filed and Summons issued.

2. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, were duly served with Summons and a

copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

3. That the Defendant, EVERETT DALE BURGETT, was duly served with Summons and a copy of the Complaint on the 19th day of November, 1975.

4. That the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico Corporation, were duly served with Summons and a copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

5. That the Defendant, MICHELE IMPORTING COMPANY, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975 and subsequently thereto filed its Affidavit of Disclaimer and waiver as to any right or interest in the land herein involved.

6. That the Defendant, VAUGHN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY, was duly served with a Summons and a copy of the Complaint on the 1st day of November, 1975, as evidenced by the return duly filed herein. However, VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHN SEED COMPANY subsequently dismissed out of this action on the 2nd day of March, 1976, as having no right, title or claim of interest to the land herein involved.

7. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT COMMISSION was duly served with a Summons and a copy of the Complaint on the 21st day of November, 1975, as evidenced by the return duly filed herein.

8. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION has filed its Answer herein.

9. That Defendant, UNITED STATES OF AMERICA, through its Internal Revenue Service, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975, as evidenced by the return duly filed herein, and subsequently on January 30, 1976, dismissed out as

having no right, title or interest in land being foreclosed herein.

10. That the Defendant, DENVER WHOLESALE FLORISTS Co., was not served as it was found they were included by inadvertence and error and were dismissed from this action on the 14th day of July, 1976.

11. That the default of the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, was duly entered herein by judicial order on the 29 day of January, 1976.

12. That the default of the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico corporation, was duly entered herein by judicial order on the 29 day of January, 1976.

13. Summary Judgment against the Defendant, EVERETT DALE BURGETT, pro se, was duly entered herein by judicial order on the 15th day of July, 1976.

14. That this Court has jurisdiction of the parties and the subject matter hereto.

15. That the Plaintiff has sustained, by sufficient and competent evidence, all allegations set out in the Complaint, and that said allegations are taken and considered as true.

16. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has sustained, by sufficient and competent evidence, all the allegations set out in its Answer, and that said allegations are taken and considered as true.

17. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, are justly indebted to the Plaintiff, in the principal amount of TWO HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest accumulation in the sum of NINETEEN THOUSAND TWO HUNDRED NINETY-THREE AND 03/100 ($19,293.03) DOLLARS to the

15th day of July, 1976, with further accumulation at the rate of $66.816 per day to the date of Judgment entered herein, plus reasonable attorney's fees in the amount of $5,000.00, to be set by this Court, plus costs expended herein amounting to $178.55.

18. That the real estate mortgage duly executed by Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, and recorded in Book 375, Page 736, of the Records of Otero County, New Mexico, is a valid and existing first lien on the premises described herein, and secures the repayment of the amount due to the Plaintiff as set forth above.

19. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has disclaimed all right, title and interest and claims to this cause of action by their disclaimer filed in the Court Record August 5, 1976.

20. That the payments on the note which is secured by the above described mortgage in favor of the Plaintiff, are now in default, and have been in default since the 1st day of February, 1974.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that:

1. The Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, have Judgment against the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico corporation; and EVERETT DALE BURGETT, in the principal amount of Two HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest from the 29th day of September, 1975, at the rate of $66.816 until paid in full, plus reasonable attorney's fees in the amount of $5,000.00, which are hereby set by this Court, plus costs expended herein amounting to $178.55.

2. Mortgage in favor of the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, recorded in Book 375, Page 736,

of the Records of Otero County, New Mexico, a copy of which mortgage is marked Exhibit B and attached to the Complaint filed herein, is a valid and existing first lien on the following described real estate:

> NE1/4 SE 1/4 Section 10, T16S, R13E, N.M.P.M., less lands in deed from E. B. Burgett to H. B. Burgett described in deed recorded in Book 259, Page 322, containing 10 acres;
>
> S1/2 SW1/4; NW1/4 SW1/4; Section 11, T16S, R13E, N.M.P.M.;
>
> together with all water rights and all wells and equipment used for irrigation of said land,

and that said mortgage be foreclosed and the above described property be sold according to the laws and statutes of the State of New Mexico, and that the net proceeds of said sale shall be applied, after the payment of the expenses of said sale, first to the amount due to the Federal Land Bank of Wichita, a corporation, Plaintiff herein, as set forth above.

3. That the Plaintiff or any other party to this suit may become a purchaser at said foreclosure sale.

4. That execution issue for any deficiency which may remain due and owning to the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, after application of all of the net proceeds of any foreclosure sale on the above described property.

5. Frank K. Wilson is hereby appointed Special Master for the purpose of selling the property described in the Complaint, and described above, at a foreclosure sale, in accordance with the laws of the State of New Mexico; and

that he is here authorized a fee of $100.00 for his services as Special Master.

/s/
District Judge

APPROVED AS TO FORM:

FETTINGER AND BLOOM

By /s/
Norman D. Bloom, Jr.
Attorney for Plaintiff

R. Baumgartner
Attorney for State of New Mexico
Employment Security Commission

APPENDIX B

IN THE DISTRICT COURT OF OTERO COUNTY, STATE OF NEW MEXICO, TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a Corporation,
Plaintiff,

vs.

E. B. BURGETT, ET AL, *Defendants*

Court's Findings of Fact and Conclusions of Law

1. This Court has jurisdiction over both the subject matter and the parties hereto.

2. Defendants appeared specially for contesting acquisition of jurisdiction in this action.

3. This foreclosure action was filed to this Court on November 18, 1975.

4. E. B. Burgett and Winnie Burgett are Defendants in this cause of action before the Court.

5. E. B. Burgett and Winnie Burgett were each separately served a summons, with a copy of the complaint attached, thereto.

6. No other attempt of service was ever made.

7. E. B. Burgett and Winnie Burgett, at the time this action was filed, were the record owners of the real estate being foreclosed herein.

8. E. B. Burgett and Winnie Burgett were the mortgagors of the mortgage being foreclosed herein by Plaintiff.

ENTERED
REC. 49 PA. 10445

9. E. B. Burgett and Winnie Burgett were each served process on November 19, 1975.

10. Emmett Owens an adult over the age of 18 years of age, served a copy of the summons, with the complaint attached, on both E. B. Burgett and Winnie Burgett by firmly attaching two sets of said summons and complaint enclosed in a clear plastic bag to the most commonly used door of the E. B. Burgett and Winnie Burgett premises and usual place of abode.

11. The door to which a separate summons, with a copy of the complaint attached, for each of the Defendants, E. B. Burgett and Winnie Burgett was attached to the most public door and part of the premises in the usual place of abode of the two Defendants.

12. At the date and time the summons was served on E. B. Burgett ond Winnie Burgett the Defendants, being man and wife, lived in the only house across U.S. Highway 82 from the Burgett Greenhouses located between Cloudcroft and Mayhill, New Mexico.

13. Everett Dale Burgett is the son of E. B. Burgett and Winnie Burgett.

14. Everett Dale Burgett is an adult male over the age of 18 years of age.

15. For at least two-years prior to September 17, 1976, Everett Dale Burgett has been responsible for and has attended to all of the legal and business affairs of E. B. Burgett and Winnie Burgett.

16. E. B. Burgett and Winnie Burgett received a copy of the final decree of foreclosure in this action on August 9, 1976.

17. On or about the 19th day of August, 1976, a copy of the final decree in this action was delivered to these De-

fendants by certified mail to their Artesia, New Mexico residence.

18. E. B. Burgett and Winnie Burgett gave the copy of the final decree of foreclosure received by them on August 9, 1976 to their son Everett Dale Burgett to take care of and do something about it.

19. Everett Dale Burgett was the manager and agent at all times material herein for E. B. Burgett and Winnie Burgett.

20. Everett Dale Burgett was personally served with summons, with a copy of the complaint attached, in this action on November 19, 1975.

21. E. B. Burgett and Winnie Burgett were temporarily in, Artesia, New Mexico when service of process in this case was served on each of them by posting to the most public door of their usual place of abode and legal premises.

22. E. B. Burgett and Winnie Burgett domicile, residence and legal premises on November 19, 1975 was the house were Emmett Owens tacked a summons, with a copy of the complaint attached, for each of the two Defendants.

23. E. B. Burgett and Winnie Burgett usual place of abode and premises was the house to which a summons, with complaint attached, for each of them was tacked on November 19, 1976 by Emmett Owens.

Conclusions of Law

1. This Court has jurisdiction of both the subject matter and the parties herein.

2. Service of process was properly made upon E. B. Burgett and Winnie Burgett on November 19, 1975.

3. Service of process was properly made upon E. B. Burgett and Winnie Burgett by posting of a summons,

with a copy of the complaint attached, for each of the two Defendants.

4. Notice of service of summons was properly posted and tacked to the most public door and most public part of the premises and the usual place for abode of E. B. Burgett and Winnie Burgett.

5. Separate summons, with a copy of the complaint attached, were posted to the door of the usual place of abode of E. B. Burgett and Winnie Burgett giving both notice of the cause of action filed herein.

6. Everett Dale Burgett, son, manager ond agent for E. B. Burgett and Winnie Burgett was personally served with a summons, with a copy of the complaint attached, hereto and had full knowledge of the action on file herein.

7. E. B. Burgett and Winnie Burgett place of domicile and resident and usual place of abode was the house to which a summons, with a copy of the complaint attached, was posted for each of the two Defendants.

8. The door to which a summons for each of the Defendants, with a copy of the complaint attached, was posted at the most public part of the E. B. Burgett and Winnie Burgett premises.

9. E. B. Burgett and Winnie Burgett were properly served with service of process in this action and had notice of this action of foreclosure.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
District Judge

APPENDIX C

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

No. 17,472

The Federal Land Bank of Wichita, *Plaintiff*,

vs.

E. B. Burgett and Winnie Burgett, et al, *Defendants*.

Order

This Matter having come on before the Court on the Motion of the Defendants and with the Plaintiff being represented by its attorneys the Law Firm of Fettinger and Bloom and the Defendant being present in Court and represented by his attorney, Mr. Don Higginbotham, the Court having heard the evidence and examined the exhibits on file herein, both parties having submitted requested Findings Of Fact and Conclusions of Law and the Court being fully advised in the premises having entered its Findings of Fact and Conclusions of Law.

It Is Ordered, Adjudged and Decreed that E. B. Burgett and Winnie Burgett, Defendants in this action, were each properly served with a summons, with a copy of the complaint attached, and the Motion to vacate the sale by Special Master of the foreclosed property herein, is denied.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
District Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

Decision

(Filed June 13, 1977)

Since there is substantial evidence to support the district court's finding that notice was properly given by posting process on the most public part of appellants' usual place of abode, the decision of the trial court is affirmed.

/s/ DAN SOSA, JR.
Dan Sosa, Jr., *Justice*

We Concur:

/s/ JOHN B. MCMANUS, JR., *Chief Justice*

/s/ MACK EASLEY
Mack Easley, *Justice*

ATTEST: A TRUE COPY

ILLEGIBLE
Clerk of the Supreme Court of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, June 30, 1977

No. 11,304

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
Defendants-Appellants.

This cause coming on for consideration by the Court upon motion of Appellants for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of Appellants for rehearing be and the same is hereby denied.

Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM, 1977

NO. 77-391

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-391

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions are as stated in the Petitioners' Brief.

JURISDICTION

Respondent maintains this Court lacks jurisdiction as the issues raised in the Petition were not presented or ruled upon by the New Mexico Supreme Court.

QUESTIONS PRESENTED

Respondent, The Federal Land Bank of Wichita (hereinafter, Bank) filed suit on November 18, 1975, seeking judgment on a promissory note and foreclosure of the mortgage securing this note. Judgment on the note was sought against E. B. Burgett, his wife, Winnie Burgett, his son, Everett Dale Burgett, and two closely held New Mexico corporations controlled by them as makers of the note. The mortgage sought to be foreclosed was given as securi-

ty for the note by E. B. Burgett and his wife as sole record owners of the subject property, in favor of the respondent bank. The mortgage and note were signed by E. B. and Winnie Burgett, his wife, with the note being also signed by Everett Dale Burgett as guarantor.

On November 19, 1975, substituted service was made on E. B. Burgett and his wife by affixing copies of the Summons and Complaint to the door of their alleged "usual place of abode" pursuant to statutory authority in N.M.S.A. 1953, Section 21-1-1 (4) (e) (1) which provides in pertinent part:

> "If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served, to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy then service shall be made by posting such copies in the most public part of the defendant's premises."

A Default Judgment was entered on August 5, 1976, against E. B. and Winnie Burgett (hereinafter the Burgetts) for their failure to appear and answer the Bank's complaint.

The Burgetts filed a motion to set aside the Default Judgment on the grounds that service of process was insufficient, the court lacked personal jurisdiction, and neither notice nor opportunity to be heard had been given.

The District Court of Otero County denied the Burgetts' motion and the Supreme Court of New Mexico affirmed this decision. The questions presented are:

1. Whether the question of whether 21-1-1 (4) (e) (1) N.M.S.A. (1953) conforms to the due process standards of the Fourteenth Amendment to the United States Constitution was properly raised in the New Mexico Supreme Court in order to provide jurisdiction for this Court to review the New Mexico Supreme Court decision.

2. Whether N.M.S.A., (1953) Section 21-1-1 (4) (e) (1), which permits service by "posting" a copy of the Summons and Complaint on the most public part of the defendants' "premises" is reasonably calculated to give adequate notice to residents of New Mexico as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the construction placed on the phrases "premises" and "usual place of abode" by the New Mexico courts, which permits a defendant to be served at a residence from which he is temporarily absent is reasonably calculated to give adequate notice of the commencement of judicial proceedings as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The New Mexico statute involved in this case is found at New Mexico Statutes Annotated, (1953) 21-1-1 (4) (e) (1) and not as cited by Petitioners. The appurtenant United States Constitutional provision involved is adequately set forth in the Petition.

The New Mexico State Constitutional provision involved is set forth in Article II, Section 18, of the Constitution of New Mexico, found in Volume 1, N.M.S.A., (1953) and reads as follows:

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

STATEMENT

On November 18, 1975, the Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett B. Owens attempted to serve process on the Burgetts at a

house owned and lived in by them located between Cloudcroft and Mayhill, New Mexico. The Burgetts lived and resided in this house for a great number of years and at the time of attempted service by Mr. Owens, were still residing in the house, although temporarily in Artesia, New Mexico.

When Mr. Owens attempted to serve process, he found no one at the house located between Cloudcroft and Mayhill, New Mexico. After personally serving Everett Dale Burgett, guarantor to the promissory note to the mortgage being forclosed, the son of E. B. Burgett and Winnie Burgett, and their agent and manager of their businesses being operated from the premises and property being forclosed, Mr. Owens asked him where his parents could be found; Everett Dale Burgett refused to disclose his parents whereabouts, giving no reason for his refusal.

Mr. Owens then went to Cloudcroft, New Mexico, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house where the Burgetts lived and which they owned between Cloudcroft and Mayhill, New Mexico. Officer Briscoe informed Mr. Owens that he was sure the Burgetts still resided at this house that he had described because he had seen E. B. Burgett recently at the post office in Cloudcroft, New Mexico. Upon returning to the Burgett house, Mr. Owens determined the most public door of the Burgett domicile and home, knocking on the door and finding no one present, he attached two copies of the Summons and Complaint to the back door of the Burgetts' home. No other method or manner of service on the Burgetts was made or attempted. E. B. and Winnie Burgett claimed they were not advised by their son and were not otherwise made aware of the law suit, although they had been served in the most reasonably probable manner to apprise them of the foreclosure suit.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District

Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett.

On August 26, 1976, the Burgetts received by certified mail, return receipt requested, a copy of the judgment in this case. Immediately upon receiving this judgment, the Burgetts turned the judgment over to their son, asking him to take care of the matter. On September 10, 1976, a motion to set aside the judgment was filed predicated on the grounds that "no proper service of process was ever had on the Burgetts", claiming they no longer resided at the house between Cloudcroft and Mayhill, New Mexico, on the date and time of service.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law and denied the Burgetts' motion to set aside the judgment, holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: the Burgetts were each served process on November 19, 1975, by attachment of two sets of summons and complaints, enclosed in a clear plastic bag, to the most commonly used door of the premises and usual place of abode of E. B. Burgett and Winnie Burgett; that the Burgetts were temporarily in Artesia, New Mexico; that Everett Dale Burgett was the son, agent, and manager of the business affairs of E. B. Burgett and Winnie Burgett, and had been responsible and attended to all the legal and business affairs of E. B. Burgett and Winnie Burgett; and conclusions of law that service of process was properly made upon both the Burgetts by posting two summons with copy of complaint attached to the most public door and most public part of the premises of the Burgetts; a conclusion that Everett Dale Burgett, son, manager and agent for the Burgetts, was personally served with a summons with a copy of the complaint attached, and had full knowledge of the action on file herein.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's findings

and conclusions of law, arguing that there was not substantial evidence upon which the Court had based its findings and conclusions of law, including the conclusion that service of process was properly made on them.

The decision of the Supreme Court of New Mexico affirming the decision of the District Court was without opinion, merely holding that there was substantial evidence supporting all of the findings and conclusions made by the trial court. The Burgetts' Motion For Rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

ARGUMENT

Point 1. THE QUESTIONS PRESENTED BY PETITIONERS WERE NOT RAISED IN THE NEW MEXICO COURTS, THUS PROHIBITING JURISDICTION IN THE UNITED STATES SUPREME COURT.

The question of whether New Mexico's service of process statute, as it relates to substituted service, violates the due process clause of the Fourteenth Amendment to the United States Constitution either on its face or as construed, was not presented to the New Mexico Supreme Court, and therefore this Court has no jurisdiction to review those questions.

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. Section 1257 (3). It is a precondition to the existence of jurisdiction under this section that the federal question upon which review is sought was presented to and ruled upon by the state court. *Cardinale v. Louisiana*, 394 U.S. 437. The assertion of a federal right must have been clear. This Court's jurisdiction does not arise from mere inference. *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655. Rule 23 (1) (f) of the United States Supreme Court places the burden on Petitioners to show the federal questions were raised, how they were raised and the manner in which they were passed upon by the state court. Petitioners have not met any of these requirements.

Petitioners do not point to anything in the record to indicate that any federal questions were raised at trial, on appeal to the New Mexico Supreme Court, or in the Motion For Rehearing filed in the New Mexico Supreme Court. Briefs before state courts are not ordinarily a part of the record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 357-8; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Even if we assume that references to briefs were proper, it goes beyond reason to suggest that the Burgetts' statement in their brief that they had not had an opportunity to plead their potential defenses (see page 9 of the Petition) and the Bank's casual reminder that due process does not provide an iron-clad guarantee that one will always have such an opportunity put the New Mexico Supreme Court on notice that a federal constitutional challenge was being mounted to the state's time-honored manner of effecting substituted service. The one and only point argued by Petitioners on appeal was that:

> THE DISTRICT COURT'S FINDING AND RULING THAT PROPER SERVICE WAS MADE UPON THE APPELLANTS WAS CLEARLY IN CONFLICT WITH THE EVIDENCE AND THE DEFAULT JUDGMENT ENTERED AGAINST THE APPELLANTS SHOULD BE SET ASIDE.

Even where clear attacks are made on state statutes for violations of "due process" the assumption is that the state and not the Federal Constitution was being relied upon. *New York ex rel, Bryant v. Zimmerman*, 278 U.S. 63 (1928); 233 U.S. 658 (1914); *New York Central and H. R. Co. v. New York*, 186 U.S. 269, 273 (1902). This is especially true where the state constitution has a due process clause as does New Mexico's Constitution. Article II, Section 18, Constitution of New Mexico.

The New Mexico Supreme Court certainly did not rule on any federal question. Its decision merely recites

that there was substantial evidence to support the trial court's finding "that notice was properly given by posting process on the most public part of appellant's usual place of abode. . ." See Appendix D of the Petition. Petitioners' entire appeal in state court was based on denial of their motion to set aside the judgment. This motion is set out at Appendix A to this response and indicates a purely factual dispute as to what their usual place of abode was at the time of service of process. More importantly, the Motion For Rehearing set out at Appendix B to this response indicates that Petitioners understood the case to be solely a "substantial evidence" case. The fact that no federal question was raised in the Motion For Rehearing forecloses any jurisdiction in this Court to review the constitutionality of New Mexico's service of process statute "as construed". *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, (1930). *Missouri ex rel, Missouri Ins.Co. v. Gehner,* 281 U.S. 313, (1930).

In summary, there is no indication that the New Mexico Supreme Court was interpreting 21-1-1 (4) (e) (1) N.M.S.A., (1953) in the light of the United States Constitution and therefore, this Court may not review its decision. *Beck v. Washington,* 369 U.S. 541, 549-550 (1962). This Court will not and cannot pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. *Adler v. Board of Education,* 342 U.S. 485, 496 (1952), and *N.L.R.B. v. Seven-Up Co.,* 344 U.S. 344, 350 (1953). New Mexico's service of process statute is fundamental to its entire system of administration of justice and any attack on its constitutionality should be made in New Mexico's own courts in a clear, direct manner so that the issue can be fully and thoroughly briefed to the extent such an important question warrants. Had the New Mexico Supreme Court been aware that it was faced with so important a question in this case it is fair to assume the matter would have received more attention from the court than it did. There was in fact no federal question presented below and there is nothing for this Court to review. The Petition should be denied.

Point 2. NEW MEXICO'S SUBSTITUTED SERVICE STATUTE COMPLIES WITH THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mandatory personal service of process is the only method of guaranteeing actual notice of a law suit against an adversary. Such a requirement would create a great injustice to those seeking the courts to settle disputes and achieve legal remedies. Debt collection, foreclosure of mortgages, and all quasi in rem causes of action could be easily thwarted by defendants avoiding personal service of process. Such is not the law now, nor has it ever been the law. *Nelson v. Chicago, B. & Q. R. Co.,* 80 N.E. 109 (1907).

Due process of law as required by the Fourteenth Amendment to the United States Constitution demands that service of process in any proceeding is notice that is reasonably calculated under all the circumstances of the pendency of the action that affords the defendant an opportunity to present his objections. *Mullane v. Central Hanover Bank and Trust Co.,* 339 US 306 (1950). Where personal service can not be obtained, the substitute that is the most likely to reach the defendant is required if substantial justice is to be done. *McDonald v. Mabee,* 243 US 608 (1917).

Each case that involves substituted service of process must be examined in its entirety to determine all the facts and circumstances of the method of service that was used, with any decision as to satisfactory or unsatisfactory adherence to due process requirements to be made upon the evidence found by the trier of fact. Where substituted process on residents of the forum has been used, each case has been examined by the appellate courts of the state[1] and

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[1] *Decher v. Gwinn,* 20 S.E. 240 (Ga. 1894); *Nelson v. Chicago, B. & Q. R. Co.,* 80 N.E. 109 (Ill. 1907); *Williamson v. Taylor,* 122 S.E. 530 (W. Va. 1924); *John Hancock Mut. Life Ins. Co. v. Cooley,* 83 Pacific 2d 221 (Wash. 1938); *Holtberg v. Brommersbach,* 52 N.W. 766

federal[2] courts to determine if, as a factual matter, due process was provided. Where the facts, as found by the trial court, have been found to be supported by substantial evidence, the appellate courts have affirmed the method of substituted service of process used. When the decision of the trial court was not supported by the evidence, the appellate courts have been quick to quash the service of process. The New Mexico Appellate Courts have been assiduous in enforcing due process requirements in interpreting and applying 21-1-1 (4) (e) (1), N.M.S.A., (1953) as it realtes to substituted service of process.[3]

In each of the seven cases that have been brought to the attention of the New Mexico Supreme Court involving the issue of substituted service of process, the New Mexico Supreme Court has carefully examined the facts as found by the trial court and determined whether substantial evidence existed to support the lower court findings and

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(Minn. 1952); *Rash v. American Federation of Labor*, 116 N.W. 2d 175 (Minn. 1962); *Spiegelman v. Birch*, 129 S.E. 2d 119 (Va. 1963); *Gunning Light & Supply Co. v. Gunning Electric Co.*, 100 A. 2d 495 (Conn. 1963); *Houden v. Hubbell*, 80 N.M. 764 (1969); *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977) filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905.

2 *Nations v. Johnson*, 65 U.S. (24 How.) 628 (1861); *Earle v. McVeigh*, 91 U.S. 398 (1876); *McDonald v. Mabee*, 243 U.S. 608 (1917); *Milliken v. Meyer*, 311 U.S. 457 (1940); *First National Bank & Trust Co. of Tulsa. v. Ingerton*, 207 Fed 2d 793 (10th Cir. 1953).

3 *Spiegelberg v. Sullivan*, 1 N.M. 575 (1873) affirming substituted service of process; *Vigil v. Pradt*, 5 N.M. 161 (1889) quashing manner of substituted service; *Bell v. Gaylord*, 6 N.M. (Gild.) 227 (1891) affirming manner of substituted service; *Houden v. Hubbell*, 80 N.M. 764 (1969) quashing manner of substituted service; *Household Finance Corporation v. McDevitt*, 84 N.M. 465 (1973) quashing manner of substituted service; *Federal Land Bank of Wichita v. Burgett*, 90 N.M. _____ (1977) filed June 13, 1977, and unreported, rehearing denied June 30, 1977, unreported, affirming method of substituted service of process; *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977), filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905, July 14, 1977, quashing manner of substituted service.

conclusions,[4] while at the same time construing the New Mexico substituted service of process statute strictly.[5] In each case affirming the method of substituted service of process used[6] and in each case where substituted service of process was quashed,[7] the New Mexico Supreme Court decision has turned on (a) evidence that the process server made an actual determination that the defendant still lived in the premises; (b) the party defendant was only temporarily absent from the premises in which he lived; (c) the process server determined the most public part of the premises where the defendant lived, i.e. the most heavily used entrance to the house; (d) no one was present at the premises and house who was willing to accept the service of process; and (e) the return of service shows attachment was made to the "usual place of abode" of the defendant.[8]

The New Mexico Supreme Court has adopted its definition of "usual place of abode" from the West Virginia case of *Williamson v. Taylor*, 122 S.E. 530 (1924)[9] wherein the West Virginia court defined the term as follows:

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4 Supra f.n.3.

5 *Household Finance Corporation v. McDevitt*, supra.

6 *Spielgelberg v. Sullivan*, supra, where defendant absconded and was avoiding service of process; *Bell v. Gaylord*, supra, where defendant absent from his home and premises; *Federal Land Bank of Wichita v. Burgett*, supra, the instant case.

7 *Vigil v. Pratt*, supra, process posted on former residence of defendant 50 miles from usual place of abode; *Houden v. Hubbell*, supra, improper identification of defendant as party to suit; *Household Finance Corporation v. McDevitt*, supra, defendant separated from husband and moved to another abode; *Vann Tool Co. v. Grace*, supra, where defendants had moved from house they still owned prior to service.

8 Supra f.n. 6 and 7.

9 *Household Finance Corporation v. McDevitt*, supra.

> "Under the statute the usual place of abode' means customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid."

This definition was reaffirmed and quoted with approval by the New Mexico Supreme Court a few weeks following the disposition of this instant case before the New Mexico Supreme Court in the case of *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977) filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905, July 14, 1977.

As each case in New Mexico relies on its own individual facts, nothing would be gained by having this Court review this particular case. A decision resting on substantial evidence is particularly inappropriate for this Court's consideration. No substantial nor major question of importance exists as to the use of the New Mexico Statutes and its application pursuant to the New Mexico Constitution and the United States Constitution.

Point 3. SERVICE ON THE "USUAL PLACE OF ABODE" SATISFIED UNITED STATES CONSTITUTIONAL DUE PROCESS.

Since the Petitioners are residents of the state of New Mexico, and this action was originally brought before the New Mexico courts on a foreclosure of mortgage on New Mexico real estate, New Mexico's constitution and laws must first be applied and interpreted. Application and interpretation of the New Mexico Constitution and laws should first be addressed by the New Mexico courts. On the question of proper substituted service of process, each state has traditionally been free to provide its own methods of substituted service of process on its own residents so long as those methods of substituted service of process comport with traditional notions of fair play and

substantial justice.[10]

Each state may determine for itself what method of substituted service of process may be used within its own boundaries.[11] Each resident of the state is thus bound to the laws of that state[12] and the methods of substituted service of process provided for if those methods meet the tests of providing due process of law.[13]

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10 *Milliken v. Meyer*, 357 U.S. 457 (1940).

11 *Blackmer v. United States*, 284 U.S. 421 (1932); *Milliken v. Meyer*, supra; *Bell v. Gaylord*, 6 N.M. 227 (1891); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907), where it was stated:

> It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and, while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the state and federal Constitutions, will be sufficient to authorize the courts of the state within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the state, or when he cannot be found, or when he conceals himself, so that process cannot be served upon him, as the result of necessity; that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant.

12 *Milliken v. Meyer*, supra.

13 *Nelson v. Chicago B. & Q. R. Co.*, supra.

Substituted service of process by posting on the door of the "usual place of abode" is reasonably calculated to give actual notice of the proceedings. The rule and its underlying reason was most succinctly stated in *Earle v. McVeigh*[14] wherein the court stated:

> "When the law provides that notice may be posted on the 'front door of the parties usual place of abode,' in the absence of a family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, 'the usual place of abode,' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted and constitute a compliance with the legal requirement."[15]

The trial court in this case did find that the service of process attached to the Burgetts' door was on the door of their "then present residence". Constitutional due process was accorded the Defendants in this case and is so accorded in New Mexico to all defendants served pursuant to 21-1-1 (4) (e) (1) N.M.S.A., (1953).

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[14] 91 U.S. 398 (1876)

[15] 91 U.S. at 400

CONCLUSION

Certiorari should not be granted because the questions presented in the Petition were not presented before the courts of New Mexico. No federal question of importance has been presented since process was made in a manner most reasonably calculated to give notice of the law suit commenced. New Mexico can determine what is the most suitable method of substituted process for its residents where due process is provided.

Respectfully submitted,

George E. Fettinger
Norman D. Bloom, Jr.
Counsel for Respondent
Post Office Drawer M
Alamogordo, New Mexico 88310

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF OTERO COUNTY,

NEW MEXICO TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA a corporation,	)	
Plaintiff,	)	
vs.	)	No. 17472
E. B. BURGETT, ET AL, Defendants	)	

MOTION

COMES NOW, E. B. Burgett and Winnie Burgett, his wife, appearing specially and moves the Court to set aside the Judgment herein and for a stay of the pending sale of the real properties which are the subject matter of this lawsuit and as grounds therefore, state:

1. That no proper service of process was ever had on these Movents.

2. That service was attempted on or about the 19th day of November, 1976, by the process server affixing to the front door of the Movents former residence, in Otero County, New Mexico, a copy of the suit papers and Summons.

3. That at least one month prior thereto these Movents had removed from said residence and established their general place of abode in Artesia, Eddy County, New Mexico. All is more particularly set out in the Affidavit of the Movents which is attached hereto as Exhibit 'A' and made a part of this Motion.

4. That no other attempts of service of process have been made upon these Movents.

5. That said process server was advised at the time he affixed the suit papers to the door that these Movents

resided in Artesia.

6. That these Movents believe that a sale of said real property which was the general subject matter of the action, is scheduled for Monday, September 13, 1976, at 10:00 o'clock a.m. at the courthouse in Alamogordo, New Mexico.

7. That irreparable harm and damage will result to these Movents if said sale be consummated.

/s/ Ronald M. Higginbotham
Ronald M. Higginbotham
Attorney for Movents
P.O. Box 2011
Roswell, New Mexico 88201

I hereby certify that a copy of the foregoing pleading was mailed to opposing counsel of record on this 9th day of September, 1976.

/s/ Ronald M. Higginbotham
Ronald M. Higginbotham

IN THE DISTRICT COURT OF OTERO COUNTY,
NEW MEXICO TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation,

Plaintiff,
vs.

E. B. BURGETT, ET AL,
Defendants,.

No. 17472

STATE OF NEW MEXICO
ss:
COUNTY OF EDDY

AFFADAVIT

COMES NOW the undersigned, of lawful age and upon their oath state:

1. That they have recently learned that they are the Defendants in the above styled and numbered cause.

2. That they were never served with process in said cause.

3. That on or about the 20th day of October, 1975, the undersigned removed their residence and general place of abode from Mayhill, Otero County, New Mexico, to Artesia, Eddy County, New Mexico.

4. To the undersigned's best knowledge and belief service of process was attempted on the undersigned on or about the 19th day of November, 1975, by affixing a copy of the Summons and Complaint to the undersigned's former abode, in Mayhill, Otero County, New Mexico.

5. No other notice or attempt of service was made upon the undersigned in said cause.

6. That on or about the 26th day of August, 1976, a copy of the final decree in said cause was delivered to the undersigned by certified mail, addressed to, 2700 Washington, Artesia, New Mexico 88210

/s/ E. B. Burgett
E. B. Burgett

/s/ Winnie Burgett
Winnie Burgett

SUBSCRIBED AND SWORN TO before me this 9th day of September, 1976, by E.B. Burgett and Winnie Burgett, his wife.

/s/ Elaine Watson
Notary Public

My Commission Expires:

April 3, 1978

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

THE FEDERAL LAND BANK OF WICHITA

Appellee-Plaintiff,

vs.

No. 11304

E. B. BURGETT and WINNIE BURGETT, et al

Appellants-Defendants.

MOTION FOR REHEARING

Comes now the Appellants-Defendants and, pursuant to Rule 19, Rules Governing Appeals, Section 21-12-19, N.M.S.A., 1953 (1976 Interim Supp.), moves this Court for a rehearing on the following grounds:

(1) The Court's decision that the District Court's finding that process was properly posted at Appellants-Defendants', E. B. Burgett and Winnie Burgett, usual place of abode has overlooked the factual basis of that finding. The evidence supporting the District Court's decision was: Appellants-Defendants leaving furniture at the house where service was posted; that the house was not rented to anyone for one or two months after the Appellants-Defendants left; that the renters only stayed for one or two months before leaving the house; the Appellee-Plaintiff's speculation that E. B. Burgett's doctors did not tell him he could not return to the Cloudcroft area until sometime after November 19, 1975; and the testimony of the Cloudcroft sheriff, Rex Briscoe, who, when asked if in November of 1975, whether he knew where the Appellants-Defendants lived stated "Not directly.", and then went on to recite that he had seen E. B. Burgett at the post office in Cloudcroft but did not remember when (Tr.

132). If the evidence of record is re-evaluated, the Court will find that the trial court's findings are not supported by substantial evidence and, thus, its denial of the Motion to Vacate should be reversed.

(2) This Court in its decision has entirely overlooked and misapprehended the principles as stated in *Household Finance Corporation v. McDevitt,* 84 N.M. 465, 505 P.2d 60. In that case, there was also evidence that the place where service was made was the defendant's usual place of abode. First, the defendant still had furniture at the house where substituted service of process was made, the defendant was still married to her husband who still lived at the house where the service was made, the defendant had only left this house a few weeks before service was attempted, and finally, the defendant had only moved into a temporary residence with a friend until she found a permanent house which she did not find until after service was made. The Court stated on Page 467 in *Household Finance Corporation v. McDevitt,* supra:

> "Defendant's claimed intention to change the usual place of abode from the Constitution Road address is substantiated by the fact that defendant never returned to the address to live, plus the fact that the parties defendant were subsequently divorced. Consequently, the Constitution Road address was not 'usual place of abode' of the appellant at the time of service of process."

This Court in its decision has further overlooked or misapprehended the principle as stated in *Household Finance Corporation v. McDevitt,* supra, in which this Court stated that any statute authorizing substituted service of process "is to be strictly construed."

(3) This Court in its decision has entirely overlooked the evidence found in the testimony of E. B. Burgett in which he testified that he moved from the Cloudcroft residence, which is the abode where Appellee-Plaintiff attempted substituted service, and moved to Artesia in Oc-

tober of 1975 and continued to reside there until the District Court hearing which was held on September 17, 1976 (Tr. 125). The Appellee-Plaintiff did not attempt service until November 19, 1975.

WHEREFORE, the Appellants-Defendants request that this Court reconsider its Opinion as filed June 13, 1977, and allow the Appellants-Defendants a full rehearing for those three specified areas where important evidence and controlling New Mexico case authority have been overlooked or misapprehended to the very grave detriment of the Appellants-Defendants.

Respectfully submitted,
STAGNER, HIGGINBOTHAM & OAS

By /s/ Keith R. Oas
Attorneys for the Appellants-Defendants
P. O. Box 1513
Roswell, New Mexico 88201